UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC d/b/a MCKENZIE-WILLAMETTE MEDICAL CENTER

Case Nos.

19-CA-077096 19-CA-095797

and

:

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 49, CTW-CLC

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE GERALD ETCHINGHAM

For the reasons set forth below, the Board should reject the arguments set forth by the Answering Brief filed by the General Counsel in response to the Exceptions and Brief in Support of Exceptions filed by the Hospital in response to the Decision issued by the Judge.¹

1.) The Settlement Agreement

In the Brief in Support of Exceptions, McKenzie-Willamette set forth a number of specific reasons as to why the Judge erred by refusing to approve the Settlement Agreement. In the Answering Brief, the General

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¹ For purposes of this Reply Brief, McKenzie-Willamette shall employ the very same shorthand references used by the Hospital's Brief in Support of Exceptions. The Hospital shall also cite to the General Counsel's Answering Brief as "AB," and McKenzie-Willamette's Brief in Support of Exceptions as "BSE."

Counsel does not address, let alone persuasively refute any of these arguments.

The General Counsel endeavors to make the case that the Settlement Agreement should not be honored because the Hospital is a recidivist. The General Counsel asserts that McKenzie-Willamette's recidivism is shown by the case now before the Board, insofar as the Complaint arises from two (2) instances of the Hospital's failure to provide information requested by the Union. See AB, page 10. That, of course, is not how the Board looks at the question of whether an employer is a recidivist. Instead, the agency will lookout outside of the confines of the case at hand and examine the employer's history, in the truer sense of the word, with respect to any previous, comparable violations of the Act. As the General Counsel effectively concedes, McKenzie-Willamette has never been found to be a violator of the Act. The General Counsel claims that the Hospital's parent company has a "history of alleged failure to provide relevant requested information to the Union." See AB, page 10 (emphasis added). Aside from the fact the General Counsel does not support the claim of such a history by reference to even one case, the General Counsel simply refuses to accept that, lest due process be tossed out the window, a case of recidivism may be based upon only upon findings, not allegations, of comparable unfair labor

practices. In addition, even under the presumption, for the sake of argument, that the Board had previously found that McKenzie-Willamette's parent company violated the Act in the context of a refusal to provide information, the record before the Judge includes no basis whatsoever to use such findings against McKenzie-Willamette.

The General Counsel attempts to employ a "too little, too late" logic to discredit the Settlement Agreement. The simple fact of the matter is that the Settlement Agreement was reached at a relatively early stage in the proceedings.² At the time the Settlement Agreement was reached, the Judge had not yet issued the Decision, and obviously therefore, no Exceptions had been filed. By virtue of the General Counsel's interference with the parties' right to effectuate private settlement, and the Judge's related, erroneous rulings, all parties have now been subject to needless litigation. The fact that a pre-hearing settlement may be preferable does not pose any good reason for the General Counsel to seek, as he did by opposing the parties' settlement here, further, unnecessary expenditures of resources.

Notably, the General Counsel makes no attempt to address, let alone persuasively refute the Hospital's argument that, while the Settlement

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² Though McKenzie-Willamette has every confidence in the Exceptions, should the Board adopt the Judge's conclusions, the Hospital would, of course, have the right to seek review by a U.S. Court of Appeals.

Agreement may not internally define the phrase "timely fashion," the phrase will be practically defined by operation of the parties' CBA. <u>See</u> BSE, pages 9-10.

Lastly, the General Counsel's claim that the Settlement Agreement is infirm due to the absence of any enforcement mechanism borders upon the inane. The Settlement Agreement is a contract, and should there be a breach, the Union would be able to pursue any enforcement mechanism available under the law.

2.) The Bannon Mills Sanctions

The General Counsel argues that McKenzie-Willamette did not have a satisfactory explanation for the Hospital's failure to produce the documents sought by the Subpoena. See AB, page 11-12. More specifically, the General Counsel points out that, at the time of the hearing before the Judge, no written document reflected the parties' settlement, which should not come as any surprise given the fact the parties' consummation of the settlement took place shortly before the start of the hearing. Likewise, the fact the Union disputed the parties had reached a settlement should not be viewed as a fact of any consequence, at least in terms of whether the Judge's imposition of Bannon Mills sanctions was an abuse of discretion. Neither the Union nor the General Counsel ever claimed that the Hospital's position

that a settlement had been reached was a position taken by the Hospital in bad faith. Indeed, not long after the close of the record, the parties would enter into the Settlement Agreement. The Hospital simply submits that Bannon Mills was not designed for a case like the one now before the Board.

3.) The Hospital's Inability to Present Relevant Evidence

In a footnote, the General Counsel declares, in the absence of any explanation, that the testimony the Hospital wished to obtain from one other witness (and there were two, actually) was not "germane." See AB, page 18, fn. 15. Not so. One of the witnesses from whom McKenzie-Willamette intended to solicit testimony was unavailable due to a medical emergency. As explained to the Judge by the Hospital's counsel, the witness' testimony would have related to, amongst other matters, the Hospital's affirmative defense that the information requests were unduly burdensome. See Tr. 118-119. Before Ms. Crider's testimony, the other witness from whom McKenzie-Willamette desired to solicit testimony, namely, Ms. Dora Chen, was not known by the Hospital as having knowledge relevant to the questions at dispute, nor was there any basis to contend that the Hospital should have, or even could have, possessed such knowledge. Id.

4.) The Hospital's "Delayed" Production of Information Related to Ms. Frost

As elsewhere, the General Counsel simply undertakes no effort to confront, much less debunk, the Hospital's primary assertion; here, that the Judge impermissibly saddled the Hospital with the burden of proof. See BSE, page 17. In addition, the General Counsel does not attempt to establish, based upon the record developed before the Judge, that the Hospital's delay in providing the information was unreasonable. Similarly, the General Counsel does not dispute McKenzie-Willamette's contention that the record includes at least one indication as to why the Hospital did not produce the requested information immediately – to wit, the Hospital's claim the grievance was not substantively arbitrable. See BSE, page 18, fn. 1. Lastly, the General Counsel does not touch upon, and therefore, must not harbor any serious disagreement with, the fact the Hospital's good faith belief the parties had reached a pre-hearing settlement presented a satisfactory explanation as to why the Hospital was not prepared to present witnesses to explain the "delay" in the Hospital's production of the information. See BSE, pages 17-18.³

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³ Contrary to the General Counsel's arguments (see AB, page 17), <u>IronTiger Logistics</u>, <u>Inc.</u>, 359 NLRB No. 13, does not apply to the case at bar. The Board's general rule is not to apply a change in the agency's law retroactively. Insofar as the alleged unfair labor practice associated with the

5.) Hospital's Refusal to Produce Information Related to the **Employees' Health Benefits**

The Answering Brief has done nothing to change what is the simple fact of the matter, as confirmed by the General Counsel's own witness, Ms. Crider. Whatever the original impetus, the Union's information requests, as they relate to the employees' health benefits, ultimately were pursued solely for the sake of the parties' negotiations, which were so far down the road as to be beyond any reasonable need of the Union. The General Counsel refers to Ms. O'Leary's letter to the Union from December 17, 2012 (see General Counsel's Ex. 14) and makes the suggestion that, through the letter, the Hospital conveyed an intention to make changes to the employees' health benefits. Aside from the fact that the General Counsel's construction of Ms. O'Leary's letter is inaccurate (see Tr. 74-75), the General Counsel ignores the fact that the Union did not take Ms. O'Leary's letter as the formal notice they deemed necessary as a condition precedent to the Hospital's right to make changes, and once again, ultimately viewed the information request

Hospital's "delay" in production of the information occurred well before the issuance of IronTiger on October 23, 2012, the case does not support the General Counsel's allegations. A substantive point of distinction is also that,

whereas the General Counsel seeks to use IronTiger in the context of the Hospital's delay in the production of information, the case was decided in

the context of an employer's refusal to produce information.

simply and solely as playing a role in the context of the parties' future – very, future – negotiations.⁴

CONCLUSION

For all the reasons set forth above, McKenzie-Willamette respectfully requests that the Board reject the arguments set forth by the Answering Brief and grant the relief requested by the Hospital's Brief in Support of the Exceptions.

Dated: August 1, 2013

Glastonbury, Connecticut

Respectfully submitted,

/s/

Bryan T. Carmody, Esq. Attorney for Respondent 134 Evergreen Lane Glastonbury, Connecticut 06033 (203) 249-9287 bryancarmody@bellsouth.net

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⁴ At one point, the General Counsel suggests, with much of an explanation, that Exception Nos. 8 and 23-26 "likely" fail to comply with the Board's Rules and Regulations. See AB, page 12, fn. 14. The fact Exception No. 8 does not cite to any specific factual finding is exactly the point, as the Hospital's objection is that, as explained by the Judge's footnote, he has not cited to those portion(s) of the record that, so far as the Judge is concerned at least, support his findings. As for Exceptions Nos. 23-26, just as the Judge's Conclusions of Law are stated generally, but follow from the Judge's previous, and albeit flawed discussion of the issues, the Hospital's Exceptions follow suit.

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on August 1, 2013, a copy of the Respondent's Reply Brief to Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision Issued by Administrative Law Judge Gerald Etchingham was served upon the following by email:

Adam Morrison
Counsel for the Acting General Counsel
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078
Adam.Morrison@nlrb.gov

Gene Mechanic, Esq.
Counsel for the Charging Party
Mechanic Law Firm
210 SW Morrison St., Suite 500
Portland, OR 97204-3149

gene@mechaniclaw.com

Dated: Glastonbury, Connecticut August 1, 2013

Respectfully	submitted,
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/s/_____

Bryan T. Carmody, Esq.
Attorney for Respondent
134 Evergreen Lane
Glastonbury, Connecticut 06033
(203) 249-9287
bryancarmody@bellsouth.net